Extradition and the European Convention – *Soering* Revisited

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I. Introduction

Ten years ago, the case of a young German changed forever the relation between extradition and human rights in Europe. In *Soering v. United Kingdom*[1], the European Court of Human Rights ruled for the first time that extradition could violate Article 3 of the European Convention on Human Rights, although the treatment contrary to Article 3 would be inflicted by the receiving non-member state. The judgment raised a number of legal issues, ranging from the "death row phenomenon" to state responsibility, and has since been a rich source of argument within the international legal community[2].

Jens Soering, 18 years old son of a German diplomat was enrolled at the University of Virginia, when in the night of March 30, 1985 the parents of his fiancé Elizabeth Haysom were brutally murdered in their Virginia home. The evidence showed that either Soering or Haysom must have been at the crime scene[3]. When the investigation zeroed in on Soering and Haysom, the couple fled to Europe. Eventually they were arrested in England. In British custody, Soering admitted the crime to save his girlfriend from the death penalty. For himself he hoped to be extradited to Germany, where he could expect a maximum sentence of ten years. However, Virginia filed for extradition and the British Government decided to grant the request on the condition that "... a representation will be made to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should be neither imposed nor carried out"[4]. Haysom did not contest the extradition order, was extradited, plead guilty as an accessory to the mur-

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[1] *Soering v. United Kingdom*, Ser. A No. 161 (1989); Decision of the European Court of Human Rights, pursuant to the European Convention on Human Rights and Fundamental Freedoms, 5 Nov. 1950, 213 U.N.T.S. 221, (hereinafter: European Convention, or Convention).

[2] *Inter alia*, Stephan Breitenmoser/Gunter E. Wilms, Human Rights v. Extradition: The Soering Case, 11 Mich.J.Int'l L. 845 (1990); Richard B. Lillich, The Soering Case, 85 Am.J.Int'l L. 128 (1991); Michael Shea, Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering, 17 Yale J.Int'l.L 85 (1992).

[3] Soering to this day claims, that Haysom killed her parents, and that he had no part in the events. A jury however convicted him of murder. See for Soerings well-written account of the events http://lucy.ukc.ac.uk/Soering/Contents.html (currently not accessible).

[4] *Soering v. United Kingdom* (note 1), para. 37.

der, and was sentenced to 90 years in prison. Soering, however, brought a complaint under the European Convention on Human Rights. The Commission, though reaffirming its prior case law that "in certain exceptional circumstances, deportation or extradition can involve the responsibility of the deporting or extraditing Convention state"[5], rejected Soering's application. Following that decision, the Court heard the case and found that extradition would violate Article 3 in view of the possibility that Soering could be sentenced to death, imprisoned on death row and executed for the crime. Both Commission and Court agreed on two crucial points: that the Convention applied in extradition cases at least where a violation of Article 3 is alleged, and that the possibility of such treatment was sufficiently foreseeable for the British Government. They disagreed, however, in the assessment of the treatment Soering would be subjected to on death row. The mere imposition of the death penalty alone would not have constituted a breach of the Convention, since Article 2 (1) permits the death penalty and the United Kingdom never ratified the 6th Additional Protocol, which abolishes the capital punishment. Soering had argued that the particular circumstances of his case, his youth, his mental state, the exceptional delay in executing the death sentence, and the conditions on Virginia's death row would constitute inhuman or degrading treatment or punishment contrary to Article 3[6]. The Commission rejected this argument and found the standards, set in prior case law, not met[7]. It explicitly discarded the contention that an alternative destination, i.e. Germany, was relevant for the determination whether Article 3 would be violated or not[8]. Oppositely, the Court qualified the conditions on Virginia's death row as a violation of Article 3. All circumstances combined met the threshold of degrading punishment laid out in the provision[9]. Subsequently the Virginia authorities formally guaranteed that the death penalty would not be imposed on Jens Soering. He was extradited and tried for the crime, and eventually given a life sentence without parole. After the *Soering* judgment was handed down in 1989, the Court reaffirmed and refined its decision in a number of cases[10], and in particular extended its holding to expulsion cases[11].

The *Soering* Judgment did away with the traditional understanding of the state's capacity to extradite and expel. No longer can governments remove aliens from

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[5] Ibid., Opinion of the Commission, para. 94.

[6] Ibid., for a detailed description para. 61.

[7] *Kirkwood v. United Kingdom*, 37 D&R 158, at 190 (1984). In *Kirkwood* the applicant did not succeed with his contention, that the conditions on California's death row and the imposition of the death penalty amounted to cruel and unusual punishment. *Soering v. United Kingdom* (note 1), Opinion of the Commission, paras 122 et seq.

[8] *Soering v. United Kingdom* (note 1), Opinion of the Commission, paras 149, 150; but see dissenting opinion of J.A. Frowein.

[9] Ibid. paras 11 et seq., and para. 111; Cf. Lillich (note 2), at 129.

[10] *Vilvarajah and Others v. United Kingdom*, Ser. A No. 215 (1991), *Cruz Varas v. Sweden*, Ser. A No. 201 (1991), *Chahal v. United Kingdom*, 23 EHRR 314 (1997), *Ahmed v. Austria*, 24 EHRR 278 (1997).

[11] *Cruz Varas v. Sweden* (note 10).

their territories without appreciation of the individual's fate; and no longer remains the process of extradition and expulsion outside the grip of international human rights obligations. In fact, the latter notion has made headway far beyond the realm of the European Convention: The general applicability of international guarantees has been acknowledged by the UN-Committee on Human Rights in several landmark cases, which explicitly cite to the *Soering* decision and the principles brought forth therein[12].

But what exactly are those principles?

From the judgment's wording itself, little more can be gathered than the applicability of the Convention in general and Article 3 in particular. On the one hand, the Court did not *per se* exclude any provision of the Convention from the extradition context and even indicated a possible future significance of Article 6[13]. On the other, the Justices recognized and emphasized the special circumstances of extradition[14] and denied that the Convention would apply to the full extent[15].

In what way, then, does the Convention control extradition and how much have the States lost of their traditional discretionary power? Can the protective tenets of the Convention be reconciled with the state's interest to remove undesired individuals from its soil?

Nearly 10 years of scholarly reflection have seen manifold attempts of explaining *Soering* and the impact of the ruling on future developments[16]. Most of these explanations concentrate on the identification of those rights believed to apply in extradition and expulsion. We will discuss these approaches and conclude that limiting the *Soering* principles to some Conventional rights is not possible in any meaningful fashion. We will then propose an alternative way of charting the relation between the Convention and extradition. We contend that all rights laid out in the Convention apply in the context of extradition and expulsion. The interests of the state can be appreciated by directly weighing them against the interests of the individual in every instance. In an effort to illustrate and support our findings, we finally submit our approach to a number of systematic and practical tests.

Today, states cooperate in combating crime and controlling migration more eagerly than ever. Those who are affected by these efforts depend on protective measures that challenge state action on an equal footing – the international stage.

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[12] *Kindler v. Canada*, No. 470/1991, UN Doc. CCPR/C/48/D/470/1991, *Ng v. Canada*, No. 469/1991, UN Doc. CCPR/C/49/D/469/1991; *Cox v. Canada*, No. 486/1992, UN Doc. CCPR/C/45/D/486/1992.

[13] *Soering v. United Kingdom* (note 1), para. 113.

[14] Ibid., at para. 89.

[15] Ibid., at para. 86.

[16] Greek mythology was called in to illustrate the radical effect of *Soering*: Christine van den Wyngaert, Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?, 39 Int'l&Comp.L.Q. 757 (1990); American scholars showed utmost concern and asked: "Is extradition to Virginia illegal?", see John Quigley/S.Adele Shank, Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?, 30 Va.J.Int'l.L. 241 (1989); David Heffernan, America the Cruel and Unusual? An Analysis of the Eighth Amendment under International Law, 45 Cath.U.L.R. 481.

Revisiting the *Soering* case, in our eyes, can help to explore the future role of the European Convention in this process.

II. Soering – *Reversing a Dogma, Preserving State Interests*

A. The Reversal of a Dogma

It has long been an unchallenged dictum of international law that states could determine at their own discretion who may remain on their territory and who may not[17]. While the exercise of this power has been subject to various rules and exceptions, the individual affected could not bring any of his internationally warranted rights to bear on the decision. In 1974 it was still acknowledged that "nowhere in extradition law and practice can the individual [...] compel the state to adhere to internationally recognized principles of extradition law"[18].

Even before *Soering*, this understanding had been called into question. In the United States the rule of non-inquiry governed extradition proceedings for centuries, almost past dispute. Any judicial review of the effects of extradition in the requesting state had so been precluded. However, the ultimate fate of the extraditee has become subject to the courts' scrutiny, if to a very limited extent[19]. In Germany, the Constitutional Court to this day refuses to apply the basic rights enshrined in the constitution to extradition. Nevertheless, the *Bundesverfassungsgericht* invokes minimum standards of international law as a judiciable barrier against extradition[20]. Statutory law reflects this limited regard for threats to the individual's rights in the receiving state, making express reference to the European Convention[21].

Internationally, the trend becomes even more apparent. Not only does the UN Committee on Human Rights recognize the application of rights laid out in the

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[17] Shea (note 2), at 87–88.

[18] M. Cherif Bassiouni, International Extradition and a World Public Order, 1974, at 563.

[19] Compare the much discussed dicta in *Gallina v. Fraser*, 278 F.2d 77 (2nd Cir. 1960), which indicated a possible exception to the rule of non-inquiry, should the treatment be "antipathetic to the Court's sense of decency", ibid., at 78. The *Gallina*-exception has been repeatedly restated by the Courts in recent years, see e.g. *Demjanjuk v. Petrovski*, 776 F.2d 571, 583 (6th Cir. 1985); *Escobeodo v. United States*, 623 F.2d 1098, 1105, cert. den., 449 U.S. 1036 (1980); admittedly despite its widespread acceptance the exception has rarely been successfully invoked, see *Starks v. Seamans*, 334 F.Supp. 1255 (E.D.Wisc. 1971). Cf. Shea (note 2), at 94.

[20] BVerfGE 59, 280 (283). See also Karin Grasshof/Ralph Backhaus, Verfasssungsrechtliche Gewährleistungen im Auslieferungsverfahren, 23 EuGRZ, 445, at 448 (1996). An exception is made, however, where the extraditee is subject to political suppression in his home country as the German constitution provides specifically for this constellation (Art. 16 a sec. 1 *Grundgesetz*). This understanding has not gone unchallenged, cf. e.g. Otto Lagodny, Grundrechte als Auslieferungsgegenrechte, 35 Neue Juristische Wochenschrift, 2146 (1988).

[21] Cf. German Law on Aliens (AuslG), para. 53 (4): "An alien shall not be deported in the event that application of the [European Convention] rendered the deportation unlawful" (translation supplied by authors); the German Law on Legal Assistance (IRG) also provides protection solely along the lines of basic international standards, para. 49 Sec.1 (2) and 73.

ICCPR in extradition cases[22], the international community has taken serious efforts to control extradition by treaty[23].

In Europe, the Commission had constantly reaffirmed its application of Article 3 of the European Convention to extradition cases[24]. The Court in *Soering* and several subsequent rulings[25] upheld this jurisprudence. The *Soering* decision produced but two certainties: The Convention principally encompasses extradition and Article 3, if any right, applies[26]. No matter how narrow this holding may be understood, it surrendered extradition to the Convention's regime.

B. Extradition and the Interests of the State

For states the applicability of the European Convention gives rise to a number of concerns[27], that have previously been contained by the dogma of state discretion.

Foreign policy, needless to say, rarely dwells on considerations of human rights protection alone. Judging non-member states by the standards of the Convention can bring a heavy burden upon foreign relations. The *Soering* reasoning may well escape foreign governments and is certainly difficult to convey during extradition proceedings[28]. Thus, refusal to extradite on such grounds can provoke diplomatic tensions and may result in an unfavorable reputation of the requested state with the international community.

There is a more immediate effect, too. One author has phrased this concern in the simplest of terms: "If we are not going to extradite their murderers, why should they extradite ours?"[29] The concept of reciprocity in extradition is not only one of international comity or mere necessity. To an ever-increasing degree, states are bound to extradite by treaties. These mostly bilateral agreements do not provide for a right to refuse extradition on grounds of human rights violations. Modern treaties almost always constitute an obligation to extradite and feature

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[22] *Kindler v. Canada*; *Ng v. Canada*; *Cox v. Canada* (note 12).

[23] See Article 3 (I) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, GA Res. 39/46, UN Doc. A/39/51 (1985), entered into force 26 June 1987 (hereinafter UNCAT).

[24] Cf. *in extenso* Jochen A. Frowein/Wolfgang Peukert, Europäische Menschenrechtskonvention, EMRK-Kommentar, 1996, Art. 3, para. 18, note 67 (hereinafter: Frowein/Peukert).

[25] *Cruz Varas v. Sweden*; *Vilvarajah and Others v. United Kingdom*; *Chahal v. United Kingdom*, *Ahmed v. Austria* (note 10).

[26] *Soering v. United Kingdom* (note 1), para. 91.

[27] For a thorough overview on the development of state interests in extradition, see Fathalla Omran El-Mesweri, Denial of Extradition: Exceptions, Exemptions and Exclusions – Study under National and International Criminal Law (1982), Thesis, George Washington University Law School; cf. for the rule of non-inquiry, Shea (note 2), at 93.

[28] The case of the Kurdish separatist leader Abdullah Öcalan gives vivid proof of this reality: When Italy refused extradition to Turkey on grounds of anticipated violations of the European Convention and the Sixth Protocol, diplomatic relations between Turkey and the EU came to an all-time low.

[29] Cf. M. Cherif Bassiouni/Edward M. Wise, Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law (1995), 37.

a concise list of exceptions, mostly reflecting traditional exemptions[30]. It is a well-founded fear that the application of the European Convention set the extraditing state on a collision course with its other treaty obligations. In any such conflict, the Convention would prevail before the European Court of Human Rights. It is therefore in the interest of the state to limit the potential of collisions.

Further, a state that is severely restricted in expelling, extraditing or deporting aliens may attract fugitives from other states. In the likely event that the state lacked subject-matter jurisdiction over cases involving foreign parties and acts, those individuals would escape prosecution and walk free[31]. Even if prosecution were possible, the state would be left with the costs of the criminal proceedings and imprisonment. Notwithstanding the actual merits of this argument[32], the state may well obtain a reputation for harboring criminals on the loose, an undesirable label in a world seeking closer cooperation in crime control.

Finally, in expulsion cases states often assert considerations of national security[33]. Tolerating individuals deemed to endanger the country's *ordre public* may require costly security measures. In addition, where the possibility to remove dangerous individuals becomes a rare one, tightening police and security laws may soon be the State's response of choice, ultimately affecting all citizens.

Whether these concerns prove valid or not will largely depend on the situation in which they are claimed. However, their general legitimacy cannot be questioned as long as the notion of state sovereignty remains intact. But are the interests of the state really jeopardized by the *Soering* holding?

C. The Scope of *Soering*

The European Court in the *Soering* judgment broadly introduces: "Insofar as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting state under the relevant Convention guarantee"[34]. Then, however, the Justices write that this "cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention"[35]. Put in simpler

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[30] Cf. the argumentation of the British Government in *Soering v. United Kingdom* (note 1), para. 83; and the concerns of the Court, ibid., para. 89, compare Lillich (note 2), at 143.

[31] This concern is reflected in the doctrine of *aut dedere aut judicare* (extradite or prosecute); cf. Bassiouni/Wise (note 29), 26–28.

[32] The "Safe Haven" argument loses much of its plausibility in light of the various assurances states grant routinely in extradition cases; *primo exemplo*, Soering was eventually surrendered to the Virginia authorities following a binding statement of the prosecutor not to seek the death penalty. Cf. Shea (note 2), at 130 and 136, 137; and also Lillich (note 2), at 141.

[33] Cf. *Chahal v. United Kingdom* (note 10), paras 75–82.

[34] *Soering v. United Kingdom* (note 1), para. 85 (emphasis added).

[35] Ibid., para. 86 (emphasis added).

terms, in extradition cases the Convention generally applies, yet not to the full extent.

The latter limitation shows that the Court does not wish to render specific state interests immaterial in the extradition context. The refusal to give full effect to the Convention cannot be read but as an acknowledgement of the extraordinary status of extradition. The *Soering* judgment recognizes state interests yet undertakes to reconcile them with the interest of the individual in effective protection[36].

This very basic holding of the Court has led to a debate on the relation between the Convention and extradition after *Soering*. As the traditional notion had crumbled, the Court's focus on Article 3 lent itself to the pursuit of clear answers. In the effort to delineate the scope of applicability of the Convention, various interpretations have been introduced that revolve around the function and character of Article 3.

III. Explaining Soering*: Which Rights Apply?*

All of the interpretations advanced so far seek an abstract and *a priori* solution to the Court's notion of limited applicability. The concepts can roughly be divided into two broad categories. Some seek to limit *Soering* strictly to Art 3. Others, though quite cautiously, extend *Soering* to certain other rights believed to be similar to Article 3. They share one common trait: Dividing the Convention's guarantees into those that apply and those that do not. Consequently, the challenge has been to tell the one from the other.

A. Article 3 as an Exception

1. Narrow Approach: Leaving Article 3 Untouched

The narrowest approach to *Soering* would limit the applicability of human rights in extradition cases to the bare contents of the *Soering* holding: Only Article 3 in its traditional interpretation would then potentially block an extradition[37]. The argument finds some support where the Court describes Article 3 as "[enshrining] one of the fundamental values of the democratic societies making up the Council of Europe"[38]. This interpretation provides for an utmost degree of foreseeability and reliance for extraditing States. Any extradition request would only have to be tested against the confounds of the Court's existing jurisprudence on Article 3.

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[36] Ibid., para. 87. The Court held that the Convention has to "be interpreted and applied so as to make its safeguards practical and effective".

[37] So possibly A.H. Robertson/J.G. Merrills, Human Rights in Europe, 3rd revised and expanded edition, 1993, at 44 (hereinafter: Robertson/Merrills).

[38] *Soering v. United Kingdom* (note 1), para. 88.

The highest administrative court of Germany, the *Bundesverwaltungsgericht*, had to decide on the relation between the Convention and German deportation statutes. The applicable provision establishes that prosecution or punishment according to the laws of the receiving state "do not stand in the way of deportation"[39]. The statutes, however, do provide for the exception that deportation becomes illegal where the application of the European Convention so requires[40]. The German court ruled that the term "application" refers to the jurisprudence of the European Court, the latter being limited to Article 3 of the Convention[41]. Thus in Germany the Convention controls deportation solely within the reach of Article 3.

To be sure, precedents indeed only extend to Article 3. *Soering*, however, does not suggest that such narrow approach to the judicial review of extradition cases had been intended. The Court cites Article 3 as "one of the fundamental values"[42]. A minimalist interpretation of *Soering* fails to answer the question why Article 3 should be the only of those values prevailing in extradition. What, if any, are the other fundamental values, and why despite their fundamentality do they not qualify as a judicial hurdle to extradition?

2. Broad Approach: Expanding Article 3

In a series of decisions the Commission has expanded the scope of Article 3 under the pressure of circumstance[43]. In *Amekrane v. United Kingdom*, a Moroccan officer who fled to Gibraltar after a failed coup d'état, was surrendered by the British authorities and promptly executed after a mock trial. The Commission found the case brought by the officer's widow admissible on the grounds of an alleged violation of Article 3[44]. Here the prohibition of inhuman punishment and degrading treatment was apparently held to include violations that would fall within Article 2 or Article 6 in any other context. A similar tendency can be found in *Brueckmann v. Germany*. Mrs. Brueckmann was sought by the East German authorities for the murder of her father. The Commission again found the complaint admissible as to a possible breach of Article 3 of the Convention[45]. The evidently questionable trial practice in the former communist state qualified as a potential breach of Article 3 – an obvious expansion of the scope traditionally associated with the provision.

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[39] Para. 53 (5) AuslG (German Law on Aliens), see note 21.

[40] Para. 53 (5) AuslG, by way of incorporating para. 53 (4).

[41] BVerwGE 99, 331, (Decisions of the *Bundesverwaltungsgericht*).

[42] *Soering v. United Kingdom* (note 1), para. 88 (emphasis added).

[43] P. van Dijk/G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, 2nd ed., 1990, at 235–237.

[44] *Amekrane v. United Kingdom*, Decision 5961/72, 16 Yb 356. The case was settled, when the British government agreed to pay compensation in the amount of £37.500.

[45] *Brueckmann v. Germany*, Decision 6242/73, 17 Yb 458. The case was struck from the docket, when Germany adapted its domestic extradition laws, enabling it to revoke the extradition order.

The tendency displayed by the Commission would indeed bear out several advantages for the interpretation of Conventional freedoms in extradition proceedings. It recognizes the need for extending the Convention's helm to certain severe fact patterns, while still limiting judicial review to relatively narrow confounds.

Yet by the same token, incorporating additional interests into Article 3 raises the same doubts that reducing *Soering* to the traditional grip of Article 3 does: It remains unclear where the superiority of Article 3 is located. In addition, by including virtually all grievances in one right one will ultimately render the other rights of the Convention secondary in nature. "To stretch the concept of inhuman or degrading treatment to cover behavior which is merely discomfiting is therefore undesirable as it trivializes and could ultimately weaken part of the bedrock of the Convention."[46]

The Court's jurisprudence does not support the incorporation of other rights into Article 3[47]. The extradition cases so far brought before the Court all fell within the range of its traditional Article 3 interpretations[48]. Moreover, the various dicta and implications of the judgments at hand seem to indicate a general willingness to entertain different rights of the Convention, should need arise[49].

In *Soering*, the Court refrained from an examination under Article 6 after determining that Article 3 was violated[50]. However, it would not "exclude that an issue might exceptionally be raised under Article 6 [...] where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country"[51]. In doing so, the Court expressly refuted the Commission's opinion "that the proposed extradition could not give rise to [a] responsibility"[52] under the provision. The Justices identified the fair trial guarantee as holding "a prominent place in a democratic society"[53] – certainly an indication that the Court's notion of fundamental values in the Convention is not limited to Article 3 alone. As the facts in *Soering* did "not disclose such a risk"[54], no breach of Article 6 was found.

The Court also makes frequent mention of Article 8 in extradition cases. In such context, a breach of Article 8 could arise out of two essentially different constellations: If the extraditee's family remains in the requested state, any interference with Article 8 will take place as an immediate effect of a Member State's

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[46] Robertson/Merrills (note 37), at 46; see also *Olsson v. Sweden (No. 1)*, Ser. A No. 130 (1988).

[47] The Court's Judgments are all the more deciding as the Commission has ceased to exist and its previous adjudication will henceforth gradually lose its impact. See Protocol No. 11.

[48] Admittedly, subjecting the death row phenomenon in the *Soering* case to Article 3 has been an innovation. But, while unprecedented, it would most likely have been adjudicated under this provision in a non-extradition context as well. For the grievances of the death row phenomenon, Article 3 presents the most specific freedom.

[49] Cf. Lillich (note 2), in note 22; Quigley/Shank (note 16), at 267–68.

[50] *Soering v. United Kingdom* (note 1), para. 113.

[51] Ibid.

[52] Ibid., para. 112.

[53] Ibid., para. 113.

[54] Ibid.

action alone and therefore does not entail the issue of extraterritorial reach. If, by contrast, all members of the family are to be extradited, a breach of Article 8 can only be claimed if family life becomes impossible in the requesting state, subsequent to extradition[55]. It is the latter situation, which needs to be examined for our purposes here.

In *Cruz Varas v. Sweden*[56], three Chilean nationals, a married couple and their son, were served deportation orders. Before the orders could be executed, two members of the family fled into hiding, apparently within the country. The Court rejected, in accord with the Commission's findings, any violation of Article 3 and then briefly turned its attention to the alleged breach of Article 8. The Court made clear that under the circumstances "responsibility for the resulting separation of the family cannot be imputed to Sweden", since "the evidence adduced [did] not show that there were obstacles to establishing family life in their home country"[57]. The Justices understood well the difference between the immediate effects of deportation on the right to family and a possible imputation of such adverse effects resulting from the situation in the receiving state. As all three applicants were originally ordered to leave the country, no such infringement could immediately result from the act of extradition itself, while likewise effects in the home country were held to be unsubstantiated. The reasoning strongly suggests that as a matter of principle the Court would consider the merits of an alleged Article 8 violation, resulting from the receiving state's behavior subsequent to deportation. This conclusion appears all the more likely in light of the fact that the *Cruz Varas* decision was returned more than two years after the *Soering* verdict. The debate over the role of Article 3 and the implications of the *Soering* decision could have hardly escaped the Court at this time. The *Cruz Varas* case would have been a well-suited occasion to rebut any claims to extend the application of the Convention beyond Article 3.

Furthermore, it is well-settled law that once a state has ratified Protocol No. 6[58], Art. 2 of the Convention blocks extradition in cases involving capital punishment[59]. It can be safely assumed that the *Soering* Court had exactly this in mind when it made reference to the UK not having signed the protocol[60].

Consequently, all attempts to limit the application of the Convention to Article 3 in extradition cases put themselves in opposition to the Court. If one attached essential meaning to the Court's pronunciation of fundamental values, any set of rights reflecting this notion would have to reach beyond Article 3.

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[55] The first situation has been at the heart of *Djeroud v. France*, Ser. A No. 191-B (1991), and *Chahal v. United Kingdom* (note 10), where only one member of the family was subject to extradition.

[56] *Cruz Varas v. Sweden* (note 10).

[57] Ibid., para. 88.

[58] Protocol No. 6, signed 28 April 1983; entry into force 1 March 1985.

[59] *Short v. The Netherlands*, 29 I.L.M 1388 (1990), containing a translated excerpt of the summary decision citing to the incorporated opinion of the Advocaat Generaal; cf. Mary K. Newcomer, Arbitrariness and the Death Penalty in an International Context, 45 Duke L.J. 611, at 628 et seq.; van Dijk/van Hoof (note 43), at 237, cf. note 131.

[60] *Soering v. United Kingdom* (note 1), paras 102, 103.

The crucial questions for such approach must then be where and on what grounds to draw the line between those freedoms that apply and those that do not.

B. Fundamental Rights

1. Absolute and Relative Rights

To determine the set of Conventional guarantees applicable in extradition, one may differentiate between freedoms subject to express restrictions and "absolute" rights[61]. Does this classification not imply a superiority of those rights accorded without express limitations? Indeed, the classification places Article 3 in a small group of rights[62] also including Article 6 – incidentally the very provision the *Soering* Court has mentioned as applicable in extradition cases as well[63]. This approach would find the set of applicable rights within the structure of the Convention itself. It would do so in a manner that could dwell not only on a well-established doctrinal background for the Convention itself[64], but as well draw from domestic concepts of classification prevalent in most Member States[65]. In other words, singling out the relevant freedoms in extradition cases would follow a technique European lawyers are generally familiar with.

The Court has described Article 3 as prohibiting "in absolute terms torture or inhuman or degrading treatment or punishment"[66], and made explicit reference to the lack of express limitations in the provision[67].

As a rule, absolute rights fashion a scope that generally requires a case by case interpretation, but is, once determined, impenetrable. By contrast, relative rights have a rather unambiguous scope, while featuring a catalogue of lawful restrictions[68]. However, this categorization does not ensue a more intensive protection and thus superior status of the former compared to the latter.

Article 5 of the Convention enshrines the principle of personal liberty. Core of this right is the freedom of the individual from arbitrary detention: "Everyone has the right to liberty and security of person"[69]. Recognizing that detention can at times be necessary, the provision requires it to be "in accordance with a procedure prescribed by law". This prerequisite, somewhat related to the German *Gesetzes-*

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[61] So possibly Wyngaert (note 16), at 764–65.

[62] Cf. Articles 4 (slavery), 6 (fair trial), 12 (marriage) of the European Convention on Human Rights.

[63] *Soering v. United Kingdom* (note 1), para. 113.

[64] Frowein/Peukert (note 24), Vorbemerkung zu Art. 8–11, para. 2; cf. van Dijk/van Hoof (note 43), at 573–74 et seq.

[65] Cf. Germany: Eckart Klein, Preferred Freedoms-Doktrin und deutsches Verfassungsrecht, in: Festschrift für Ernst Benda 135 (1993), at 148.

[66] Cf. *Soering v. United Kingdom* (note 1), para. 88; *Chahal v. United Kingdom* (note 10), para. 79; see also *Ahmed v. Austria* (note 10), para. 40.

[67] Ibid., respectively.

[68] Van Dijk/van Hoof (note 43), at 574.

[69] Art. 5 (1).

vorbehalt and the American notion of due process, essentially provides for a procedural safeguard. In addition, the Article enumerates the occasions in which the State can claim substantive justification for detentions. The list includes, *inter alia*, "lawful detention of a person after conviction by a competent Court"[70], pretrial detention[71], and custody in the context of deportation or extradition[72]. Those lawful restrictions reflect a historical experience[73] aiming to make any state intrusion of liberty a limited and foreseeable event.

The drafters of the Convention could have chosen to put the right to personal liberty in absolute terms. An obvious wording may have read:

No one shall be subject to arbitrary deprivation of liberty.

Some qualification, such as arbitrary, would need to be included in order to account for the State's legitimate interests. Any such qualifying term leaves more room for interpretation than the crisp catalogue of Article 5, allowing for a greater degree of restriction.

The choice between express limitations and absoluteness does not *per se* derive from any notion of hierarchy. It is much more likely that the nature and specific historical background of each freedom accounts for the shape in which it is protected.

For our purposes, a brief look at relative rights of the Convention compared to Article 3 as an absolute right, will be of help: In the case of Article 5 the protected freedom is clear. Either an individual is detained or enjoys his or her liberty. With respect to freedom of speech, protected in Article 10 of the Convention, one can either make a statement or not, publish a newspaper or not, etc. By contrast, it is not nearly as clear what constitutes degrading treatment. The freedom protected in Article 3 requires an interpretation that eludes straightforward, objective criteria. The Court itself has always acknowledged this fact[74].

The different mechanics of protecting rights follow substantial differences in the history and practical nature of those rights. The different forms that rights take in the Convention cannot serve as an indicator of superiority[75].

2. *The Role of Non-Derogability*

Article 3 is enumerated in Article 15 and so protected from derogation in times of a national emergency[76]. Does this not suggest an inherent superiority, recognized by the Convention itself? On this assumption, the holding in *Soering* could be extended to other rights similarly protected.

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[70] Art 5 (1) a.

[71] Art. 5 (1) c.

[72] Art. 5 (1) f.

[73] Compare for the same issue in the German context, Klein (note 65), at 148.

[74] Cf. *Tyrer v. United Kingdom*, Ser. A No. 26 (1978), para. 30.

[75] Cf. Klein (note 65), at 148: "Die systemlose, weil am Einzelgrundrecht orientierte, Schrankenregelung erweist sich so als ungeeignet, fundamental freedoms zu definieren." ("The concept of express limitations, relating to each separate right and thus unsystematic, so proves to be unsuitable for defining fundamental freedoms"; translation supplied by the authors).

[76] Art. 15 (2) of the Convention.

A classification of rights based on Article 15 has the legal beauty of finding the applicable rights within the Convention itself. The catalogue of Article 15 would provide for a limited set of obstacles states face in extradition. At the same time, more constellations would come under the protection of the Convention than Article 3 alone could muster, avoiding any makeshift expansion of the provision[77].

The *Soering* Court made, if rather apodictic, reference to Article 3 as a non-derogable right under Article 15[78]. This reference has been reiterated in many subsequent rulings concerning extradition[79]. However, the Justices never went beyond the mere mention of Article 15 and thus leave open whether the Court does derive any notion of superiority from non-derogability[80].

Tracing superiority with the help of non-derogable rights dwells on the assumption that those rights are non-derogable because they are superior – a classic circular argument. Under non-emergency circumstances, the list of Article 15 does not prevail over other rights set forth in the Convention. The concept of non-derogability can be better explained by the character of an emergency situation. It is the underlying precept of the Convention that the State may never infringe upon the individual's rights without due reason[81]. In a state of emergency the State may, by the natural course of events, assert certain justifications not available under normal circumstances. The Convention recognizes this need by allowing derogation from otherwise more thoroughly protected freedoms. In a state of emergency, curtailing freedom of speech, freedom of assembly and the right to privacy may well constitute an imperative, if temporary measure for maintaining the public order[82]. The same can hold true for expanding the limitations on the liberty of person[83]. Even those measures, however, are "strictly limited by the exigencies of the situation"[84]. The Convention thus makes derogation generally dependent upon harsh standards of justification in every instance. Article 15 (2) acknowledges that those very exigencies can never necessitate additional restrictions on the enjoyment of rights that are essentially unrelated to the needs of a

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77 Compare for this problem, *supra* IV.A.2. "Broad Approach: Expanding Article 3".

78 *Soering v. United Kingdom* (note 1), para. 88.

79 Cf. *Chahal v. United Kingdom* (note 10), para. 79; *Ahmed v. Austria* (note 10), para. 40.

80 Given the extensive scholarly reception of this portion of the *Soering* judgment, it seems telling that the Court has never elaborated on its apodictic statement.

81 Cf. *Soering v. United Kingdom* (note 1), para. 89; with respect to restrictable rights compare van Dijk/van Hoof (note 43), at 584.

82 Klein (note 65), at 149 (generally referring to the German Grundgesetz): "Gerade die besonders wichtigen demokratischen Grundrechte [...] werden insoweit am ehesten Ziel entsprechender Maßnahmen sein." ("In particular, the utmost important democratic freedoms [...] will insofar become a likely target of such measures"; translation supplied by the authors).

83 Cf. *Brogan and Others v. United Kingdom*, Ser. A No. 152-B (1989), where the Court found a violation of Art. 5 (3) in the length of detention without judicial review (four to seven days). At this time the United Kingdom had revoked its notice of derogation with respect to Northern Ireland. After the verdict, however, the British Government submitted notification again and continued its detention practice; approved by the Court in *Brannigan and McBride v. United Kingdom*, Ser. A No. 258-B (1993).

84 Art. 15 (1); compare *Lawless v. Ireland*, Ser. A No. 3 (1961).

state during emergencies[85]. The democratic state[86], in an emergency "threatening the life of the nation"[87], can simply reap no legitimate benefit from summary executions, torture, the imposition of slavery, or the implementation of *ex post facto* laws.

The concept of non-derogability reflects a practical need that can arise in extraordinary circumstances and does not imply a hierarchy of freedoms. Extradition does not constitute a situation that compares to the "exigencies" of a state of emergency. Article 15 is therefore unsuitable to single out the rights in the Convention that govern extradition.

3. Concepts of Superiority Outside the Convention

The quest for a hierarchy of rights in the Convention chimes in with a strong trend among the international legal community[88] to identify "basic" or "fundamental" human rights as opposed to rights of a lesser stature[89]. Possibly, *Soering* reflects a reality of international law suitable to resolve conflict situations of this kind in general[90].

Whenever rights collide with a principle of international law, a hierarchy within the system of human rights protection "has an attractive simplicity"[91]. Indeed, the discovery of a superior set of rights would make it possible for the extraditing state to take the bitter with the sweet: Where Article 3 is a member of some internationally crystallized set of *ueber*-rights, submission to the *Soering* principles becomes politically less embarrassing and troublesome, while danger from lesser Conventional rights looms no longer. But the equation, in all its simplicity, sails or sinks with the question whether a meaningful set of superior rights exists.

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[85] Klein (note 65), at 151: "[D]er Sinn dieser Regelung [besteht darin] bestimmte Rechte vor Eingriffen zu schützen, deren Unantastbarkeit für einen Staat auch in Notstandssituationen als zumutbar erachtet wird" ("[T]he meaning of these rule [lies with] the protection of certain rights whose inviolability is considered reasonable for the State even in times of emergency"; translation supplied by the authors).

[86] Cf. this foundation of the European Convention on Human Rights: Preamble, Articles 8–11, 15.

[87] Art. 15 (1).

[88] A concise analysis can be found in: Theodor Meron, On a Hierarchy of International Human Rights, 80 Am.J.Int'l L. 1 (1986), at 1, 2.

[89] *Barcelona Traction Light and Power Co., Ltd.* (Belgium v. Spain), 1970 I.C.J. Rep. 4, at paras 33, 34, see also *Nicaragua Case* (Nicaragua v. United States), 1986 I.C.J. Rep. 3, at 134; diss. op. of Judge Weeramantry in the *East Timor Case*, 1995 I.C.J. Rep. 90, at 172; cf. Malcolm Shaw, International Law, 4th ed., 1997, at 96.

[90] So possibly Quigley/Shank (note 16), at 251–54.

[91] Meron (note 88), at 4, citing to Oscar Schachter, The United Nations and Internal Conflict, in: Dispute Settlement through the United Nations, K. Raman ed. 1977, at 301, 305.

a) Implications of Treaty Law

In international human rights treaties, a wealth of vocabulary is employed to describe the rights conferred upon the individual[92]. However, the terminology, ranging from human rights to fundamental freedoms, or any combination thereof, is interchangeable and hence, the terms "are the same"[93]. While the European Convention in its title seems to imply two categories[94], in the actual body no reference is ever made to this differentiation. In fact, the Convention always cites to its title in tandem[95] or employs all-encompassing terms such as "obligation"[96]. Consequently, the Convention's language does not indicate a hierarchy of rights[97].

Some rights of the Convention are also reflected in more specialized treaties, amongst them the prohibition of torture. Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[98] spells out a block to extradition where there is a danger of torture in the requesting state. Notwithstanding the general difficulties arising from a concept of interpreting one treaty with the help of another, the European Court itself states that "[t]he fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention"[99]. Furthermore, the existence of such specific international obligation does not by itself confer a superior status to those rights that are subject to both treaties. A multiple protection of certain rights may well reinforce and extend the effectiveness of protection internationally, but cannot set apart some rights from others, as long as the respective treaties coexist on the same level of legal force.

Consequently, an analysis of existing treaty law remains, at best, inconclusive. In order to establish a set of superior rights within the Convention, one would have to resort to principles outside the language of human rights treaties.

b) The Principle of Obligations *Erga Omnes*

In the *Barcelona Traction Case*[100], some rights have been accorded the status of *erga omnes* obligations. The International Court of Justice stops short of a concise

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92 Cf. analysis in Meron (note 88), at 5.

93 Ibid.

94 "European Convention on Human Rights and Fundamental Freedoms" (emphasis added).

95 Cf. Art. 17: "rights and freedoms".

96 Art. 15 (1): "obligations".

97 Meron (note 88), at 5, 6. According to Meron, this generally holds true for all regional instruments, at 6.

98 UNCAT, (note 23), Art. 3 (1) states: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

99 *Soering v. United Kingdom* (note 1), para. 88.

100 *Barcelona Traction Light and Power Co., Ltd.* (Belgium v. Spain) (note 89).

list of sources for such obligations, but does, in an exemplary fashion, name some of them. Among others the Justices found "the principles and rules concerning the basic rights of the human person, including the protection from slavery and racial discrimination"[101] to qualify. The wording leaves open whether those basic rights address only some human rights or all[102]. Should the dictum pronounce the existence of some limited set of principles, one is again left with the uncertainty of how to define such set. The notion of "rights basic to the human person" invites the whole array of personal opinions and values.

In light of the limited legal effect of the *erga omnes*-principle[103], and the vagueness of the ICJ dictum one could well subject all human rights to the principle. Indeed, scholarly writings[104] and pronouncements from the UN[105] suggest that exactly this had been done since the judgment was passed. The principle of *erga omnes* as put forward by the *Barcelona Traction Case* does not give leverage to a concept of superior rights – it either embraces all rights or fails to substantively outline any special group of rights.

c) The Concept of *Jus Cogens*

The principle of *jus cogens*, well-established but still somewhat vague as to its ultimate contents[106], proclaims that certain notions of international law defy any alteration or abandonment[107]. *Jus cogens* has found expression in the Vienna Convention on the Law of Treaties[108]. According to this widely ratified covenant, general principles of international law, i.e. *jus cogens*, will prevail over treaty obligations. The latter bears particular significance in our context, as the application of the European Convention in extradition cases may give rise to a collision with bilateral extradition treaties – exactly the situation for which the Vienna Convention provides relief.

Even if a list of *jus cogens* human rights existed, its scope would be extremely limited. It may be safe to include the prohibition of torture for these purposes[109].

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101 Ibid., at para. 34.

102 Cf. Meron (note 88), at 10.

103 In the area of human rights protection, the *erga omnes*-principle solely provides standing for every State to protest human rights violations in any other State.

104 Meron (note 88), at 12, 13.

105 Cf. Statement of UN Assistant Secretary for Human Rights, Dr. Kurt Herndl, UN-Press Release (Geneva), No. HR/1733, August 6, 1985, at 2.; Meron (note 88), at 12, 13.

106 Cf. Ian Brownlie, Public International Law, 4th ed., 1990, at 512–514.

107 Ibid.

108 Art. 53 of the Vienna Convention.

109 Cf. Restatement (Third) of the Foreign Relations Law of the United States §702 (1987), comment, listing human rights norms believed to have the status of *jus cogens*; cf. also Brownlie (note 106), at 513 (not explicitly referring to "torture", but "to crimes against humanity"). Shaw (note 89), on the other hand, finds an indication of which human rights belong to the group of *jus cogens*-rights in the non-derogability of some rights, at 204. This approach encounters the same arguments that were brought forward against the assignment of a special, hierarchical value to the notion of non-derogability.

But the definitional range of torture would most likely be confined to its classic contours, as the international consensus does not reach beyond these. For instance, the UN Human Rights Committee in the *Kindler* case[110] found that the so-called death row phenomenon did not *per se* violate Article 7 of the ICCPR[111], because "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment, if the convicted person is merely availing himself of appellate remedies"[112]. By contrast, the *Soering* judgment attaches importance to the length of pre-execution detention and discards any justification on the basis of the appeals process. This divergence illustrates that the death row phenomenon can hardly fall within the grip of *jus cogens*. Furthermore, the European Court ruled in the *Tyrer* Case that the administration of corporal punishment for juveniles amounted to degrading punishment encompassed by Article 3[113]. And in *Soering*, the Court did not limit its holding to specific parts of Article 3 when it assigned the provision its controversial fundamental value. Finally, the references to Articles 6 and 8 in the Court's jurisprudence, too, suggest that the Court strives to entertain allegations that go beyond any conceivable *jus cogens* list of rights.

C. Conclusion

It is impossible to determine in an abstract fashion the line between those rights that apply in extradition cases and those that do not.

The European Court itself does not support a principal limitation of its holding in *Soering* to Article 3. Furthermore, the Convention does not provide for inherent criteria to select those rights that should control extradition. The line between absolute and relative rights is a purely mechanical distinction reflecting the different characters of the respective freedoms. Equally, the concept of non-derogability set forth in Article 15 caters to practical needs in extreme circumstances. It neither endorses any notion of hierarchy, nor does it allow for an analogy to extradition.

All other theories of hierarchy remain inconclusive. They ultimately depend on subjective criteria or evaluations on some meta-level of justification. Therefore, they either lack the necessary consensus in the legal community or have practically failed altogether.

In addition, all the approaches bear the common risk of weakening the Convention's effectiveness. As the classification of rights must be at the core of any hierarchical system, some provisions will inevitably be returned to a second class status. Not only does this devaluate those very rights, it also leads to the distension of then "first-class" rights, ultimately weakening the latter as they lose

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110 *Kindler v. Canada* (note 12).

111 Ibid., at para. 6.4.

112 Ibid., at para. 15.2.

113 *Tyrer v. United Kingdom* (note 74), at para. 29 and 35.

clarity. – "In these ways hierarchical terms contribute to the unnecessary mystification of human rights rather than to their greater clarity."[114]

IV. Explaining Soering*: All Rights Apply!*

A. Overview

The *Soering* decision has expanded the scope of the Convention[115]. For better or for worse, the Convention can apply even where the violating effect takes place outside the Convention territory. It has been shown that this expansion cannot be limited to some Conventional guarantees in any meaningful way. From this understanding it follows that, in principle, all rights laid out in the Convention can control extradition.

At the same time, the legitimate interests of the State must be taken into account when determining whether an act of extradition is lawful or not. Any approach that acknowledges the general applicability of the Convention, must hereat reconcile the Convention's broader reach with the special circumstances of extradition.

B. Convention – How much?

1. Full Applicability

Forasmuch as all rights apply in extradition, they may naturally bring with them their inherent limitations. The rights in the Convention prescribe the elements of the legal process in which a conflict between a state and the individual is resolved. They convey legitimacy to this process by identifying the legal interests of the individual and authoritatively shape the form by which the State may attempt to have its interests weighed against those. So understood, the "normal" process of determining an alleged breach of a particular freedom is generally suited to provide for the interests of the State. The notion of imputation would then translate: So long as effects in the receiving state occur but for the act of extradition and are foreseeable, the act of extradition qualifies as any other state conduct[116]. The Court's innovation would only relate to the question of causality, expanding the relevant state conduct to consequential liability, the effects of which occur outside the Convention territory. The act of extraditing Soering would have constituted a proximate cause for his exposure to the death row phenomenon.

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[114] Meron (note 88), at 22.

[115] The Court acknowledged for the first time the practice of the Commission; cf. Otto Lagodny, Anmerkung zum Soering-Fall, 37 Neue Juristische Wochenschrift, 2183, at 2189 (1990): "Man soll [...] nicht mehr über das Ob des EMRK-Schutzes diskutieren, sondern sich auf die eigentliche Sachfrage konzentrieren und die Reichweite des Schutzes analysieren." ("One should not discuss the ifs of the European Convention protection, but concentrate on the actual question and analyze the scope of this protection"; translation supplied by the authors).

[116] Cf. Breitenmoser/Wilms (note 2), at 877.

Unfortunately, this approach transgresses the boundaries the Court has drawn for the applicability of the Convention in extradition.

Confined to the ambit of the respective provision, the State could seek justification only within the powers of limitation accorded therein. A brief look at some of the Convention's guarantees reveals that its language does not always allow for the inclusion of these interests in the weighing process.

While Articles 8 to 11 feature broad catalogues of limitation powers, they "according to the jurisprudence of the organs of the Convention [...] should be interpreted strictly and narrowly"[117]. Even if one succeeded in forcing extradition interests into the language of these limitations[118], such attempts will ultimately suffer defeat vis-á-vis Article 5. Article 5 contains limitations specifically cut out for detention[119]. Thus, every anticipated deprivation of liberty in the receiving state not in complete accord with the catalogue of Article 5, would *per se* supersede any extradition interest – a grim perspective for states as interference with the liberty of person is among the most common grievances extraditees face in the receiving countries.

Time and subsequent practice will show whether extradition interests can retain their special status, perish altogether or become ultimately integrated into the Convention by way of an additional protocol. For now, the unique character of extradition has been affirmed by *Soering* and so forces its weight upon each balancing of interests.

Could states then not legitimately assert additional powers of intervention, given the indisputable earmarks of extradition? The Convention itself explicitly states that "[n]othing in this Convention may be interpreted as implying for any State [...] any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or their limitation to a greater extent than is provided for in the Convention"[120]. The Commission had for some time entertained the thought that the "special legal position of an individual may allow for limiting rights by way of inherent limitations"[121]. In the so-called *Vagrancy Cases* the Court has found the express limitations to be "exhaustively enumerated" and thus rejected the doctrine[122]. Where the Convention

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117 Loukis G. Loucaidis, Essays on the Developing Law of Human Rights, 1995, at 185; *Klass v. Germany*, Ser. A No. 28 (1978), para. 42; *Sunday Times v. United Kingdom*, Ser. A, No. 30 (1979), para. 65.

118 Cf. van Dijk/van Hoof (note 43), at 584, who suggest that the Court places primary emphasis on the clause "necessary in a democratic society", instead of the different interests listed in the restriction clauses.

119 This applies likewise to the possible limitations on the publicity of a trial in Article 6.

120 Article 17 European Convention; *a maiore ad minus*, this holds true for arguments that can only be found outside the Convention's structure as is the case with the traditional sovereign right to extradite claimed by states.

121 Cf. *X. v. Austria*, Appl. 2676/65, Coll. 23 (1967), 31; as well *X v. Federal Republic of Germany*, Appl. 2375/64, Coll. 22 (1967); for a detailed presentation see van Dijk/van Hoof (note 43), at 575 et seq.

122 See *De Wilde, Hoomes and Versyp*, Ser. A No. 12 (1972), 45; reaffirmed in *Golder v. United Kingdom*, Ser. A No. 18 (1975), 21–2.

applies in full, it is impossible to circumvent the insufficient reach of some of the limitations by introducing restrictions that derive from sources other than the language of each provision itself[123].

Expanding the limitations of those rights by way of analogy meets with the straightforward preclusion of Article 18: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". Consequently, in some instances, the extradition interests would almost certainly be blocked completely, a clear contradiction of the Court's pronouncement that the Convention does not apply "to the full accord"[124].

2. Partial Applicability

If not for engaging the full scope of each freedom, why then does the Court impute the degrading treatment in Virginia's death row to the U.K? Why, if the Commonwealth of Virginia cannot directly be held against the standards of the Convention, is the anticipated treatment of Jens Soering described in the terms of Article 3?

The key lies in the formulation of the Court that even in extradition the principle of effective protection prevails[125]. It is in invoking this precept that the Court expands the scope of the Convention. While the Court clearly recognizes the capacity of the State to extradite, expel and deport an alien at its own discretion, it levies a substantial restriction for this notion of state sovereignty. No longer are the legitimate interests of the State to remove someone from its territory without any counterweight. The Conventional guarantees do provide the individual with a measure against the State: Where the extradition renders human rights protection ineffective, the individual's interest prevails. To determine whether, in each individual case, the Convention would suffer such defeat, it is necessary to define the interests of the individual that may weigh so heavily. For this, the Court takes recourse to the catalogue of guarantees the Convention provides. These very definitions are used to describe the effects of any extradition or expulsion[126]. In other words, only the effects of extradition in the requesting state are imputed to the extraditing state, so long as they are foreseeable. Foreseeability serves as a legal threshold to exclude situations where the State, unaware of the effects in good faith, had no reason to refrain from extradition or expulsion.

A breach can thus be only manifested when the State's interests in extradition fail to outweigh the individual's interests in avoiding the – foreseeable – effects. To this degree, the Conventional protections in extradition can fall short of those in

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[123] Thus the concept of inherent restrictions ("immanente Schranken"), on certain occasions put forward in German constitutional law, can be of no service here.

[124] *Soering v. United Kingdom* (note 1), para. 86.

[125] *Soering v. United Kingdom* (note 1), para. 88.

[126] As shown above *supra* note 1, the Court does not see a difference between extradition and other forms of removal in this respect.

a non-extradition context. The interference with the individual's protected sphere is held against the extradition interests of the State, and not subject to the standard powers of limitation. As the Court put it: Extradition is not precluded by the mere fact that the Conventional freedoms are not guaranteed in the receiving state "to the full accord".

This is not to be confused with the concept of inherent limitations. After all, the limiting effect does not stem from the written body of the Convention but from its expansion by the Court. Where a court enlarges the scope of a given freedom it is free to determine the ultimate reach of that expansion. This method to first expand and then limit is not without precedent in Europe. Most prominently, in the *Cassis de Dijon* case[127] the Court of the European Communities overturned German trade restrictions by broadening the scope of Art. 30 EC-Treaty, which has its express limitations in Art. 36 EC-Treaty. At the same time the Court contained the extension by acknowledging consumer protection as a new power of limitation not listed in Art. 36 EC-Treaty[128].

C. At the End of the Day: The Direct Balancing Approach

Giving the Convention full force, and locating the State's interest in extradition and expulsion within the standard powers of limitation runs counter to the European Court's holding in *Soering*. The balancing of interests in extradition will have to immediately confront the State's cause with the individual's right as set forth in the Convention. To account for the latter, the anticipated effects in the receiving country must be imputed to the State; for the former, the rights so defined must be directly held against the interests of the State.

The Court's references to Article 15 support this understanding. In a state of emergency, the State is allowed to claim additional interests in the weighing of interests. And a weighing of interests it remains: Core of Article 15 is not the catalogue of non-derogable rights, but the prescription of additional powers of limitation, namely, the power to take "measures [...] strictly required by the exigencies of the situation". While emergencies cannot compare to extradition and expulsion, the principle of applying different powers of limitation under special circumstances is not unknown to the Convention.

This direct weighing of interests, best referred to as "the direct balancing approach", faces a number of serious questions: Can the *Soering* judgment be so explained without putting a spin on the Justices' words? Can there be a balancing of interests where the right is absolute, such as Article 3? Does it reconcile the State's interests with effective protection of rights? And, does the approach work, when used with any random pattern of facts?

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[127] *Cassis de Dijon* Case *(Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein)*, 120/78, (1979) E.C.R. 649.

[128] Ibid., para. 8.

V. Testing the Direct Balancing Approach

A. Article 3 and the Notion of Absoluteness

1. Balancing of Interests in Absolute Rights

Article 3 affords absolute protection once the State's action meets any of the provision's elements. One must therefore examine whether the proposed direct balancing of interests in extradition cases can be located in absolute rights as well.

Article 3, too, prescribes a balancing process. While the degree of protection may well be absolute, "[...] there is no absolute standard for the kinds of treatment prohibited by Article 3"[129]. As shown above[130], absolute rights feature a scope of protection that requires interpretation in every individual case. A certain qualification in a provision held in absolute terms "is almost inevitable in the case of the application of an abstract norm"[131]. The elements of Article 3 are broad and call for appropriation in each instance: "The practice of the Strasbourg organs has shown that terms like 'inhuman' or 'degrading' are not static but require dynamic interpretation in accord with the respectively valid standards of the European order"[132].

The European Court developed "definitional distinctions between the concept of torture and the lesser, yet significant concept of inhuman or degrading punishment"[133]. In the first case featuring a thorough analysis of Article 3, the *Greek Case*, the Commission found that "[t]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical which, in the particular situation, is unjustifiable"[134]. In *Ireland v. United Kingdom*[135], the Court determined that alleged violations of Article 3 must attain "a minimum level of severity"[136]; the Court interpreted torture as "deliberate inhuman treatment causing very serious and cruel suffering"[137]. The interrogation techniques of the British government, under scrutiny here, did not meet this threshold each by themselves. However, together they amounted to inhuman treatment, as "in the determination of a possible Article 3 violation all facts and

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[129] Van Dijk/van Hoof (note 43), at 230.

[130] *Supra* IV.C.1

[131] Van Dijk/van Hoof (note 43), at 230.

[132] Frowein/Peukert (note 24), Article 3 para. 2: "Die verwendeten Begriffe sind weit und bedürfen wegen ihrer Unbestimmtheit einer Konkretisierung in der Rspr. der Konventionsorgane. Dabei hat sich auch gezeigt, dass Begriffe wie 'unmenschlich' oder 'erniedrigend' nicht statisch, sondern dem jeweilig geltenden Standard der europäischen Ordnung entsprechend ausgelegt werden müssen."

[133] Heffernan (note 16), at 521.

[134] The *Greek* Case *(Denmark, Sweden, Norway and the Netherlands v. Greece)*, 1969, Rep. of 5th Nov. 1969, 12 Yb. 186.

[135] *Ireland v. United Kingdom*, Ser. A No. 25 (1978).

[136] Ibid., para. 162.

[137] Ibid., at para. 167.

circumstances"[138] had to be taken into account. In *Tyrer v. United Kingdom*, the Court reiterated this basic understanding and found that "[t]he assessment is, in the nature of things, relative: It depends on all the circumstances of the case and in particular on the nature and context of the punishment itself and the manner and method of its execution"[139].

Clearly, the Strasbourg organs themselves base the determination of an alleged violation of Article 3 on a case by case assessment of the facts and circumstances. Interpretation of Article 3 is "subject specific"[140] and "depend[s] upon the justiciability of the issues"[141]. This very appraisal of the case's setting cannot but include the legitimacy of the interests the state asserts in the infliction of the disputed treatment. One may imagine a situation where police forces arrest a suspected criminal, leading him handcuffed and sparsely clad across a public space. This treatment by itself is certain to cause significant humiliation and discomfort. Nonetheless, any violation of Article 3 will solely depend on the context of the arrest: In pursuit of a minor traffic violation, this police conduct would undoubtedly lack justification, constituting degrading treatment. By contrast, where the arrested is a suicide assassin and suspected to carry explosives on his body, shackling and undressing the person may be the only option for the police to warrant public safety[142]. In fact, with regard to a case involving solitary confinement, the Commission found it crucial to decide "whether the balance between the requirements of security and basic individual rights was not disrupted to the detriment of the latter"[143].

The balancing process of Article 3 as an absolute right is located within the interpretation of the provision's scope. It is here that the interests of the State in extradition or expulsion meet with those of the individual.

2. Extreme Instances of the Weighing Process

It would not be surprising to find patterns of circumstance, in which the process of balancing the competing interests will always tilt to one side or the other. Certain types of treatment or punishment can never be justified by any interest the State might claim[144]. On the same token, particularly minor grievances will usually be outweighed by state interest. It is inherent to the proposed balancing

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138 Ibid., at para. 168.

139 *Tyrer v. United Kingdom* (note 74), at para. 30; cf. express reference in *Soering v. United Kingdom* (note 1), para. 100.

140 Cf. Michael K. Addo/Nicholas Grief, Is There a Policy Behind the Decisions and Judgments Relating to Article 3 of the European Convention on Human Rights?, 20 E.L.R. 178 (1995), at 187, referring to this interpretation as "operational policy".

141 Ibid., at 191.

142 To illustrate the relevance of this hypothetical example, see Appl. 2291/64, *X v. Austria*, 24 Coll. Dec. 31 (1967) for a not at all unrelated precedent.

143 *Kroecher-Moeller v. Switzerland*, 34 D&R 24 (1983), at 52.

144 Cf., most recently, *Aydin v. Turkey*, 25 EHRR 251, para. 3. (rape and severe ill-treatment in detention).

approach that the Court defines these areas. In fact, the Strasbourg organs have always declared that treatment possibly within the purview of Article 3 must meet a minimum degree of severity[145]. The obvious purpose is to exclude claims under Article 3 that are based solely on subjective inclinations and all too individual thresholds of humiliation. In the examination of an alleged discrimination between legitimate and illegitimate children, the Court held that, "while the legal rules at issue probably present aspects, which the applicants may feel humiliating they do not constitute degrading treatment coming within the ambit of Article 3"[146].

On the opposite end of the scale, the Court has identified a large variety of treatments and punishments where no interest of the State could keep the conduct outside the reach of Article 3[147]. From there, it follows that certain kinds of treatment, by virtue of their mere intensity, preclude the relevance of corresponding state interests. So understood, no state interests could ever balance out torture. Consequently, the absolute protection against torture is the result of an extreme case of competing interests.

B. Application to the *Soering* Case and Other Scenarios

1. Soering

The crucial question now is, whether the direct balancing approach is fit to explain the *Soering* reasoning. The *Soering* Court wrote: "[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"[148]. The Justices strictly applied this understanding when they determined that the conditions on Virginia's death row violated Article 3.

In the outset the Court identified as the State's interest that "the establishments of safe havens for fugitives would not only result in danger for the State obliged to harbor the protected person but also tend to undermine the foundations of extradition"[149]. It then engaged in an extensive analysis of the situation awaiting *Soering* in Virginia. Based on the exhibits of the petitioner and the Federal Republic of Germany, the Justices first evaluated the psychological implications of a lengthy imprisonment prior to execution[150]. Living "in the ever-present shadow of death" would, in the Court's eyes, produce "anguish and mounting tension"[151]. The Court took note of the legal reasons behind the lengthy period of imprison-

[145] Cf. only *Soering v. United Kingdom* (note 1), para. 100.

[146] *Marckx v. Belgium*, Ser. A No. 31 (1979), para. 28. The Court went on and did find a violation of Art. 8 in conjunction with Art. 14, a prime example for the basic understanding that not every grievance in breach of the Conventional guarantees automatically constitutes degrading treatment.

[147] Cf. see *Ireland v. United Kingdom* (note 135), para. 168.

[148] *Soering v. United Kingdom* (note 1), para. 89.

[149] Ibid.

[150] Ibid., at para. 105 (i).

[151] Ibid.

ment, i.e. the existing appeals and *habeas corpus* process in Virginia and the U.S., designed to "ensur[e] that the ultimate sanction of death is not unlawfully or arbitrarily imposed"[152]. The Justices then turned to the prison conditions prevalent on death row in the Mecklenburg penitentiary[153]. The analysis contraposed possible security concerns underlying the "severity of [the] special regime" with "the protracted period lasting on average six to eight years" inmates spend on death row[154]. Finally, the Court attached relevance to the age and apparently disturbed mental health of Soering[155]. Being only 18 years old, the youth of Soering was found to be a "circumstance which is liable, with others, to put in question the compatibility with Article 3 of measures connected with a death sentence"[156].

The Court did not declare any of the various conditions a violation of Article 3 by itself[157]. It was in their summary conclusion that the Justices found the anticipated situation on death row within the ambit of Article 3: "[H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3."[158]

The determination of whether the circumstances of the case could engage any responsibility under Article 3 was not complete, however, without one further aspect. Germany, Soering's home country, had also requested his surrender for prosecuting him for the same offenses[159]. The Commission had discarded this fact as immaterial, in order to avoid the establishment of a dual standard based on the availability of alternative destinations[160]. The Court, by contrast, considered the option relevant "in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case"[161]. While the Commission's concerns were acknowledged as valid considerations[162], by way of Soering's surrender to Germany "the legitimate purpose of extradition could be achieved in a means which would not involve suffering of such exceptional intensity or duration"[163].

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[152] Ibid.

[153] The correctional facility in Virginia where prisoners sentenced to death are kept.

[154] Ibid., at para. 105 (ii).

[155] Ibid., at para. 105 (iii).

[156] Ibid.

[157] Cf. Lillich (note 2), at 141.

[158] *Soering v. United Kingdom* (note 1), at para. 111.

[159] German law provides for personal jurisdiction in criminal law based on nationality, regardless of the locus of the offense, Cf. §§1–7 Strafgesetzbuch (Criminal Code).

[160] See *Soering v. United Kingdom* (note 1), para. 110 and Commission Report, ibid., paras 149, 150.

[161] Ibid., para. 110; cf. also Lillich (note 2), at 141.

[162] Ibid., para. 110: "This argument is not without weight."

[163] Ibid.

In the determination of a possible breach of Article 3, the Court took due note of the State's legitimate interest in extradition and assessed its weight in the particular circumstances of the case. The possibility of surrendering Soering to Germany may not have been the deciding factor. It did, however, weaken the legal significance of the UK's interest in avoiding the presence of undesired suspected criminals, tipping the scale toward the side of Soering.

In end effect, the Court found extradition to Virginia in breach of Article 3 because the State's interests failed to outweigh the sum total of the grievances Soering had to expect on death row.

2. *The* Chahal *Case*

The Court, in its subsequent jurisprudence, had the opportunity to clarify its holdings in *Soering*. In *Chahal v. United Kingdom* the Justices wrote: "It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the [*Soering*] judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."[164] Does this wording not preclude the approach of directly balancing the State's interest against the individual's?

Chahal, a leader of the Sikh separatist movement was to be expelled from the United Kingdom on grounds of national security. Chahal claimed his return to India would result in a violation of Article 3. He listed a variety of potential dangers, including extrajudicial execution. Those scenarios were supported by reports of Amnesty International submitted by the petitioner. The United Kingdom contested the allegations.

Aside from this factual argumentation, however, the UK also claimed that in cases of national security, expulsion were lawful even if a risk of ill-treatment existed. The government referred to "implied limitations" it unearthed in paragraphs 88 and 89 of the *Soering* judgment. Furthermore, it was argued that "where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community"[165].

The Court plainly rejected the existence of implied limitations[166]. It also denied that national security concerns could have an impact on how to assess the probability of ill-treatment in the event of expulsion: "[W]henever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the Contracting State to safeguard him or her against such treat-

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164 *Chahal v. United Kingdom* (note 10), para. 81.

165 As reiterated by the Court, ibid., para. 78.

166 See submission of the British Government in ibid., at para. 76 and the Courts rejection of this notion in ibid., at para. 80.

ment is engaged."[167] Ultimately, the Court was persuaded by the evidence[168] and found that a real risk for ill-treatment in the event of expulsion had been sufficiently established.

The issue in dispute did essentially not relate to the question of whether the alleged possibilities of disappearance, torture or extrajudicial execution[169] in India would qualify as a violation of Article 3. In light of the previously discussed jurisprudence of the Court, such treatment will always be in breach of Article 3. Rather, the Court had expounded the standards, which must apply in assessing the risk of such treatment in the receiving country.

It is for the latter that the Court precluded any relevance of those interests the State may have in expulsion or extradition. Hence the rejection of "any room for balancing the risk of ill-treatment against the reasons for expulsion"[170].

3. Future Situations Involving Article 3

The jurisprudence of the European Court on extradition has been developed in the context of Article 3. The cases adjudicated embraced only a small number of the issues that can generally be raised under this provision. Indeed, extradition often entails potential grievances that are prone to fall within the purview of Article 3. It stands to reason that this provision will continue to play an important part in the findings of the Court. The direct balancing approach must prove to be practicable in a variety of scenarios under Article 3 that have not yet been brought before the Court. It is therefore helpful to test the approach against hypothetical fact constellations. Those will have to take into account that Article 3 issues are particularly controversial where the alleged severity of the treatment is not *per se* unjustifiable by state interests. Thus, cases involving "merely" degrading treatment have traditionally constituted the greatest legal challenge. In principle, nothing else can be expected in the extradition context.

In the *Tyrer* Case[171], the Court held that the birching of a juvenile as a judicial measure amounted to degrading punishment. In this situation a minor was sentenced to three lashes, to be administered by a police officer in the presence of the parents. First, the Court held that this sanction did not constitute torture or inhuman punishment. Assuming that every punishment contains an element of degradation, the Court based its further examination on the degree of humiliation inflicted. Whether this humiliation comes within the reach of Article 3 must then be determined "according to the circumstances of each separate case"[172]. The Court found this to be so and referred especially to the manner of how the punishment was executed.

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[167] Ibid., para. 80.
[168] Ibid., para. 100.
[169] Cf. ibid., paras 89, 99, citing to the report of Amnesty International.
[170] Ibid., para. 81, emphasis added.
[171] *Tyrer v. United Kingdom* (note 74).
[172] Ibid., para. 30.

The interests of the State in continuing its traditional method of juvenile punishment could not prevail over the interests of the applicant not to be subjected thereto.

How would this case be decided in an extradition context?

For the sake of argument the following facts shall be assumed: The individual in question, minor *A*, had to expect a corporal punishment by a police officer in the presence of his parents in his home country. As an illegal alien he was to be expelled from Member State *X*. Following the direct balancing approach, the Court would have to determine how the interests of the State in expulsion would compare to the interest of *A* not to be subjected to the punishment. The birching in *A*'s home country would be imputed to *X* for the purpose of describing the interests of *A* in this weighing process. One could now assume that any corporal punishment imposed on juveniles is of such severity that no state interest could ever prevail. Were this the case, the hypothetical case would constitute an example of those instances where the outcome of the weighing process is prejudiced by the severity of the treatment inflicted. However, the language in the *Tyrer* Case also includes the Court's concept of deciding in the light of "all circumstances of each separate case"[173] and mentions for this the context of the punishment[174]. This wording consequently allows for the consideration of the State's expulsion interests. In our hypothetical example, *A* was an illegal alien. The state has a legitimate interest to disallow and to discourage the influx of undesired foreigners. Certainly, expelling *A* would reaffirm this policy. However, this rather abstract concern, in the absence of special circumstances surrounding *A*, will hardly hold fast against the psychological and physical harm resulting from judicial corporal punishment. Thus, the state would act in breach of Article 3.

This appropriation may change once the expulsion interests reflect more than a general immigration policy. Supposing, *A* has been a habitual juvenile offender in the country of *X*, with an extensive record of driving without a license, underage drinking and computer fraud. Under those circumstances the government may well maintain a legitimate interest in preventing future criminal conduct on its soil. It must be noted here that the State would not itself impose or even condone the anticipated punishment. Rather, *X* may have no choice but to subject *A* to this treatment through expulsion. Realistically, however, *A* would rightfully be able to point to a variety of measures at the disposal of the state, which come short of expulsion, thus avoiding the penalty. The possibility of alternatives such as juvenile sanctions or educational supervision may diminish the weight of the state's interests, tipping the scale towards the side of *A*, and thus rendering expulsion a degrading treatment. To be sure, the ultimate outcome of such weighing process cannot be predicted with certainty and remains for the Court to decide.

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[173] Ibid., para. 35.

[174] The Court, for all that, has found the mere existence of a corporal punishment regime in a school not to be in violation of Art. 3, see *Campbell and Cosans*, Ser. A No. 48 (1982), paras 29–31.

To illustrate the implications of the balancing approach further, one could elevate the offenses of *A* to a much more severe level. Presuming that *A* had previously engaged in terrorist acts in another country and was suspected to resume his activities in State *X*, concerns of national security or public safety would attain indisputable relevance. Held against *A*'s interest, the former is likely to prevail. In this situation, accommodating the State's expulsion interests does not seem to be possible without tolerating the humiliation by corporal punishment.

The hypothetical example shows that the direct balancing approach compels a detailed examination of the competing interests. At the same time, where there remains leeway for considering the State's interests in light of the Strasbourg jurisprudence on Article 3, a fair balance can be struck, based on the exhibits of each individual case.

C. The Balancing Approach And Other Conventional Guarantees

1. Article 6: "Fair Trial"

The Court, as mentioned before, has explicitly named Article 6 as a provision, which may be applied in an extradition context in future cases[175]. The balancing approach must thus allow for a satisfactory solution therefor. For this purpose the following hypothetical situation will be assumed:

In the federal State T of country X a grand jury issues the indictment of criminal suspects. In this secret procedure the defendant is not represented by counsel, while the jury investigation often amounts to a full inquiry into the case. A has been charged by the authorities with aggravated assault against a police officer. A skips bail and makes his way to G before the grand jury convenes for the first time. State T, through the State Department of X, files for extradition with the G authorities in accordance with the Extradition Treaty both parties have concluded. A asserts that extradition to T would violate his right to a fair trial under Article 6 of the European Convention on Human Rights. He argues that the fair trial maxim traditionally embraces the right to be represented by legal counsel throughout the entire criminal process, including indictment proceedings.

Article 6 is for the most part an absolute right. It guarantees every defendant a "fair trial", requiring an interpretation for this term. The Member States of the European Council have very diverse criminal justice systems, fashioning a variety of different indictment procedures. The Court has always acknowledged the existence of variant legal traditions and has consequently refrained from prescribing specific procedures within the realm of Article 6[176]. Instead, the Strasbourg organs have established a number of principles they deem essential for a trial to be fair. Consequently, a violation of Article 6 can only be established in light of the par-

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[175] Cf. *Soering v. United Kingdom* (note 1), para. 113.

[176] Cf. *Albert and LeCompte v. Belgium*, Ser. A No. 58 (1983); and *Barberà, Messegué and Jarbado v. Spain*, Ser. A, No. 285-C (1988); Frowein/Peukert (note 24), Article 6, para. 71.

ticular circumstances of the case and the legal system in which proceedings take place[177]. In employing the balancing approach, one will have to weigh *A*'s fear of unfair jury proceedings against the interests of *G* to extradite. The Court itself indicated that only a "flagrant denial" of a fair trial could give rise to a violation in an extradition context[178]. In most European legal systems, grand jury proceedings are not known and the right to legal representation extends to the whole process of indictment. However, the criminal trial in *T*, once indictment has been issued, follows every standard of fairness, including representation by counsel. It appears doubtful whether the traditionally founded grand jury hearing would devoid a trial of its fairness in any context[179]. In extradition, this, if at all, minor shortcoming meets with the paramount interests of the State: *G* is under obligation to extradite under a treaty and has a legitimate interest in ending the presence of *A*, a suspected violent criminal. In addition, *G* would lack jurisdiction to prosecute *A* in lieu of the authorities in *T* because *A* is a citizen of *X* and the alleged offence took place outside *G*. The extradition request could be granted without running afoul of Article 6 of the Convention.

To illustrate the practicability of the balancing approach further, one may assume a more drastic fact pattern.

A has now been indicted, trial has been set, and A still enjoys life in G. According to the "three-strikes-you're-out-law" in T, A will face life imprisonment without parole in the event of a conviction, as the assault on the police officer was his third felony. The prosecution plans to introduce DNA expertise, based on residue recovered from the assaulted police officer's face. The tests had been done at the official forensic laboratories in T, an institution that had recently been criticized as inaccurate and biased in the media. A has been assigned a public defender, 25 years of age, who graduated from law school two months ago. The attorney has received most of the files and documents, but admits to have different priorities at present, citing to an unbearable workload. The defense has no funds to challenge the DNA tests by way of an alternative expertise. The assignment of a different attorney has been denied by the public defender's office. Further, A cannot afford hiring his own counsel.

The standards for a fair trial are naturally stricter, where severe consequences may be the result of a conviction. The "three-strikes"-rule may even touch upon issues under Article 3 of the Convention; in any event, a trial possibly effecting life long imprisonment must adhere to the strictest standard of fairness. Under these circumstances, the guarantee of a fair trial is jeopardized by the fact that the defense provided obviously lacks all efficiency. It stands to reason that the European standard of fair trial, notwithstanding the different legal systems, generally warrants a more effective defense. One of the traditional notions of fair trial in most European countries is the equality of arms principle, which requires that the

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177 *Soering v. United Kingdom* (note 1), para. 113.

178 Ibid.

179 In fact, the Strasbourg organs have ruled that even prosecution before a special criminal court constitutes no breach of Art. 6 and thus does not stand in the way of extradition (if to a member state); 24 Yb 132 (1981).

legal and factual means to rebut the prosecution's contentions in the courtroom be equally effective[180]. This principle suffers defeat where a questionable scientific expertise meets no counterattack for lack of funds. This holds especially true in an adversarial trial such as in the State of *T* and in view of the uncompromising punishment in question. Therefore, the European Court might not allow the State interests in extradition to supersede *A*'s anticipated grievances in its determination of a possible violation of Article 6.

2. Article 8: Family Life and Privacy

The European Court has implied in the *Cruz Varas* case that Article 8 may well be entertained in future extradition cases[181]. Further, Article 8 constitutes a prime example for those rights in the Convention that carry express limitations. Therefore, the proposed direct balancing approach can be tried on this category of rights along the lines of the right to family and privacy.

A and his daughter D live on the shores of Member State S. They had applied for political asylum with the relevant authorities. Their requests were denied as the situation in their home country H has changed much to the better in the meantime. Both are now served deportation orders after all appeals have failed. A asserts that in his home country his wife has received custody for D on grounds that would not fall within the limitations of Article 8. Country S does not contest the latter, yet claims that it has a vital interest in enforcing its asylum policies and points to the fact that A would enjoy generous visitation rights assured by the government of H.

According to the proposed balancing approach, the effects of expulsion in *H* will be imputed to *S*, but must be held against the weight of *S*' interests in expelling *A* and *D*. Article 8 itself does not provide for the interests of a State in extradition and expulsion[182]. The balancing approach remedies this shortcoming as it directly confronts the freedoms protected in Article 8 with restrictions justifiable by those State interests[183].

The institution of political asylum is a valuable and noble undertaking of states. However, where the political reasons backing an asylum request undisputedly cease to exist, the State can legitimately assert the right to deny such request. *A* and *D* face separation after their return on grounds that would not hold up to European standards. However, separating a family as such is possible under Article 8 and the anticipated situation in *H* can only be qualified as a relatively minor interference, especially in light of the liberal visitation regime. Thus, Article 8 of the Convention would not stand in the way of deportation.

This weighing process can, of course, take a much different outcome: One may assume that *A*, a fervent literary critic and famous author, lives with his wife *W* in

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[180] Cf. *Monnell and Moris v. United Kingdom*, Ser. A No. 115 (1987), para. 62; *Delcourt v. Belgium*, Ser. A No. 11 (1970), para. 28.

[181] *Cruz Varas v. Sweden* (note 10), para. 88; cf. discussion at IV.A.2

[182] See *supra*, V. B. 1. "Full Applicability".

[183] See *supra*, V. B. 2. "Partial Applicability".

S. In their home country *H* they face forcible nullification of their marriage as *A* has been declared a heretic by a religious tribunal, rendering him unfit for wedlock with *W*. It is apparent that this would constitute a most severe interference with *A*'s right to family life[184]. It is hardly imaginable that the State's interest in maintaining its asylum policies could outweigh the destruction of *A*'s family life.

The example shows that the limitations borne out of the State's interests in extradition and expulsion do not necessarily fall short of the protection warranted outside the extradition and expulsion context[185], yet can do so where the interests of the State muster the necessary weight.

Article 8 also protects the rights to privacy, Article 8 (1).

A has set up home in Member State F. He is a citizen of X and had been convicted for sexual offenses involving minors. After his early release from prison, A traveled to Europe to undergo lengthy treatment for his psychological disorders. The therapy was apparently successful and several psychiatrists attest to this. In his subsequent application for residency in F he has deliberately withheld information regarding his prior conviction. On these grounds, F now seeks to expel him and return A to his home country. In X legislation exists, known as M's Law, that requires local authorities to inform the community, when an individual with a sexual offense record takes residence. A, the reformed convict, claims that expulsion to X would expose him to severe violations of his right to privacy.

Indeed, it is doubtful whether *M*'s law could hold up to the standard limitations of Article 8 in a non-expulsion context. However, the balancing approach provides for powers of restriction not limited to the catalogue of the respective provision. Therefore, it must be examined whether *F*'s interest in expelling *A* outweighs his right to privacy. *A*, although being convicted of a sexual offense once, has since made progress in his personal development and has voluntarily undergone therapy. He has been declared cured by several experts and thus no longer presents a danger to the public. *F*, in the light of these circumstances, can only cite to *A*'s failure to reveal his criminal record. In the absence of a concrete danger, *F* may only resort to a principle of not allowing convicts in its territory, irrespective of the threat they actually pose. By contrast, *M*'s Law will almost certainly destroy *A*'s reputation and keep him from leading an even remotely normal life. Most likely, expelling *A* to *X* will violate Article 8 of the Convention and and thus be unlawful.

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[184] Apart from almost certainly raising an issue under Art. 17 of the Convention. Art. 17 provides: "Men and Women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

[185] It should be noted here that this hypothetical example needs to be distinguished from two different fact patterns. First, if only one of them was to be expelled, Member State *H* would immediately interfere with their family life, and the *Soering* principle would not be needed to impute any effects outside the Convention territory. Second, if only *A* lived in Member State *H*, but *W* had remained in *S*, the expulsion of *A* would not impair *A*'s rights under the Convention, since he did not have an intact family life in *H*, even though family live in *S* would still be impossible. Expulsion would then not change the *de facto* position of *A* in any way.

3. Article 5: The Right to Liberty and Security

Article 5 of the European Convention protects the right to liberty of person. Section 1 of the provision lists an exclusive catalogue of conditions under which an individual may be deprived of this freedom.[186] Article 5 is a classical example of a relative right: Only where at least one of the limitations applies, can a person be arrested or detained. Coined by the collective historical experiences of a whole continent, the Convention exhaustively describes the threshold for a state to take somebody's liberty. Incidentally, deprivation of liberty may well be the most common affliction foreigners will face when extradited or expelled.

A, a citizen of T, lives in the country of member state G ever since his day of birth, his parents being first generation immigrants. His people suffers unspeakable suppression in most regions of T. Following an internationally condemned incident involving the intelligence service of T, widespread protest by an internationally active opposition movement shakes Europe, among the most affected countries: G. A, without a criminal record, is arrested during a violent protest rally. He apparently was present at an attempted attack on a foreign embassy, without being directly involved. G nimbly undertakes to expel A, citing to grounds of national security and domestic tranquility. T, with tensions in the country mounting high, has announced that individuals with A's ethnic descent will "temporarily" be detained in order to "warrant public safety".[187]

Article 5 of the European Convention provides for no limitation power to curtail personal liberty for "warranting public safety". Article 5 (1) c, however, does allow for an arrest in order to keep individuals from committing a crime, thus paying tribute to the demands of safety. But the provision's language defies generous interpretation: An arrest must be "reasonably considered necessary" for preventing "an offense". The wording so commands the existence of concrete facts that suggest the imminent commission of a specific crime[188]. This suspicion cannot but depend on circumstances attaching to the individual's conduct – so long as *T* bases detainment solely on *A*'s ethnic origin, the measure will fall short of the threshold set by the Convention. Should *A*'s expected arrest not be prompted by a concrete suspicion of violating specific laws[189], his confinement would be illegal according to the standards of Article 5.

Following the direct balancing approach, *A*'s loss of liberty must be imputed to the state of *G*. At the same time, the interest of *G* in expelling *A* will be weighed thereagainst. More likely than not will they fail to prevail over *A*'s legitimate desire to stay free. *G* has a variety of legal measures at hand to prevent *A* from repeating his rather minor misconduct, short of expulsion.

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[186] Article 5 (1) a-f.

[187] For the sake of argument it will be assumed that *T* has not declared a state of emergency. Mass confinements had – under certain conditions – been found to be legal by the Court, once Art. 15 of the Convention has been formally invoked through notification; see *Lawless v. Ireland*, Ser. A No. 3 (1961).

[188] See Frowein/Peukert (note 24), Article 5, para. 81.

[189] In addition, *A* would have to be quickly brought before a competent court to contest his arrest, as required by Article 5 (3).

The case may take a different outcome, however, when one alters the circumstances surrounding *A*. Had he been a leader of the violent protest, or taken a more active part in the attacks against the diplomatic mission, *G* could possibly assert an increasingly whelming interest in removing *A* from the country. In the balancing process, *A*'s time of residency, his criminological prognosis and his previous record may well take an important part. Equally, the duration and circumstance of the expected detainment in T will bear on the result of the weighing process. How long will *A* be in custody? How effectively can he seek judicial review? What are the conditions during detainment[190]? *A*'s detainment, unjustified by the standards of the Convention, may have to be tolerated for the sake of public safety in *G*, should extreme circumstances be verified.

Testing the direct balancing approach within the ambit of Article 5 reveals its most practical effect: Expelling undesired individuals remains possible, once the State's interest is sufficiently profound. Proving the latter, however, compels a thorough inquiry into all circumstances as the individual can now describe his interest in terms of the Conventional guarantee to liberty and security.

VI. Conclusion and Summary

The *Soering* ruling of the European Court expanded the scope of the Convention into the formerly unfettered arena of extradition and expulsion. The Court has not defined the scope of its findings but rather prescribed two flagpoles, between which the Convention unfolds its protective reach. On the one side of this margin, the Justices invoked the principle of effectiveness: Extradition may not jeopardize the ultimate hegemony of the human rights system laid out in the Convention. On the opposite end, the Court acknowledged the singularity of extradition interests and maintained that the Convention does not apply to the full extent. It was this prong-like situation after *Soering* that effected a broad debate on delineating the *Soering* scope more precisely.

As we could show, limiting the scope of *Soering* simply to the confounds of Article 3 defies the words of the judgment itself. The Court will not decline to entertain possible violations of other Conventional guarantees in extradition cases, namely Article 6 and Article 8. In the same vein, including grievances in Article 3 that are controlled by more specialized provisions outside the extradition context falls short of the courts reasoning. In addition, both approaches do not bode well on the future development of the Conventional effectiveness: Where one right receives a special status of superiority, the others are left behind and may well lose their force over time.

The latter notion holds equally true for the attempts to identify some freedoms, which, by virtue of their superiority, control extradition and expulsion

[190] This question, of course, marks the line where other rights of the convention, namely Article 3, will come into consideration.

alone. Here, however, the real difficulties lie with two basic questions: Where can one draw the line between those rights that apply and those that do not? Where is superiority located?

We have seen that the absence of express limitations in some rights does not necessarily render them "stronger". The mechanics of protection that a particular freedom carries in the Convention, may reflect its history or nature but does not imply a superiority over other guarantees. A similar argumentation confronts those who take recourse to the issue of non-derogability. Article 15, too, mirrors practical needs rather than signifying an elevated status of some rights.

A look at international developments reveals that indeed the quest for a core set of human rights is not limited to the European theater. However, as we have demonstrated, no consensus has been reached on the members of any distinct group of rights, neither with respect to any body nor any concept of law. While various suggestions have been made in the legal community, they differ so greatly in their theoretical underpinnings and their concrete results that they are inconclusive for our purposes here.

We concluded that all rights of the Convention must apply in the context of extradition and expulsion because of their structural and legal equality. However, the Court did not defy the singularity of extradition as such. The legitimate interests of the state must be held directly against the freedoms the individual derives from every provision. This is, we suggested, where the two polarities of the *Soering* judgment are reconciled: Foreseeable extraterritorial effects of extradition are imputed to the State and described in terms of all the Conventional freedoms, but may be justified by the interests of the State pertaining to extradition and expulsion. In other words: The Court expanded the scope of the Convention into extradition, but contained the expansion by directly balancing the State's interest against those of the individual.

We discussed then whether the notion of absoluteness, inherent to Article 3, stands in the way of such approach. Article 3 like all "absolute" rights hosts a balancing process, located in the interpretation of the provision's scope and in itself not much different from the application of express limitations. This understanding is frequently reflected in the jurisprudence of the Court and, so we intimated, at the core of the *Soering* judgment.

When the legitimate interests of the State are held against the individual's freedoms as they are defined in the whole of the Convention, the necessary compromise will be fair and acceptable to all parties. Most importantly, only where the weighing process is located within the norm that suits the situation best, will it foster transparency and admit for the highest possible degree of legal certainty.

However the interests of the state in extraditing and expelling may be prized now or in the future, the balancing approach forces the State to justify extradition in every instance, but does not disregard its legitimate interests.

Ten years ago, the *Soering* judgment laid ground for this understanding. It goes to the heart of the European Convention On Human Rights and Fundamental Freedoms, a "living instrument" that "must be interpreted in the light of present day conditions"[191].

[191] *Soering v. United Kingdom* (note 1), para. 102.